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# COMPROMISE WITH CREDITORS IN TERMS OF SECTION 155

  
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Overview of compromises

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of the Companies Act 71 of 2008

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## Overview of compromises

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## Overview of compromises

- A compromise may be entered into between the company and its creditors
- Compromises provide an alternative to business rescue proceedings
- A compromise is defined as an agreement reached between a company and its creditors or a class of creditors that settles a dispute over the rights of the parties or their enforcement
- In practice, compromises are used to overcome the practical difficulties faced by companies in obtaining the consent of every creditor to the settlement of their claims
- Compromises are also useful in instances where creditors are located in various locations and are difficult to access
- Compromises are provided for under both the common law and statutory law
- Statutory compromises existed under the Companies Act 61 of 1973, specifically in sections 311 to 313
- Under the Companies Act 71 of 2008, compromises are provided for in section 155
- Informal compromises also exist and are sometimes opted for by companies and its creditors
- There are no guidelines for informal compromises and therefore this route is only practical where there is only a small number of creditors involved
- All creditors must support the informal compromise
- It is also important to note that there is no moratorium where compromises are being negotiated

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## Compromises in terms of section 155 of the Companies Act 71 of 2008

- Section 155 provides for a compromise between a company and its creditors
- In terms of section 155(1), section 155 applies to a company regardless of whether or not it is financially distressed as defined in section 128(1)(f)
- However, it is important to note that section 155 does not apply where a company is under business rescue proceedings
- Accordingly, where a company is finalising or negotiating a compromise, a creditor may apply to court as an affected person to place the company under supervision and commence business rescue proceedings, in terms of section 131
- Placing a company under business rescue will have the effect of bringing the negotiations for a compromise to an end
- It is important to note that a liquidator where a company is being wound up may propose an arrangement or a compromise of its financial obligations
- Accordingly, liquidation is not a bar to a compromise in terms of section 155 and a liquidator may be bound to the compromise
- It is important to keep in mind that a compromise does not afford the company protection through a statutory moratorium as in the case of business rescue
- For this reason, the danger exists that aggressive or greedy creditors may threaten to launch or in fact launch winding up applications on the basis that the company is unable to pay its debts



## Compromises in terms of section 155 of the Companies Act 71 of 2008

- In terms of section 155(2), the board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to
  - (a) every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and
  - (b) the Companies and Intellectual Property Commission
- Based on the above, the process in terms of section 155 is driven by the directors or a liquidator, as the case may be
- Only the board of a company, or its liquidator, if it is being wound up, have locus standi to make a proposal as contemplated in section 155(2) to propose a compromise
- It is not necessary for a company to get approval from the court to propose a compromise



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## The proposal to creditors

- Section 155(3) provides that a compromise presented by the board of directors, or the liquidator must contain all the information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal, and must be divided into three parts – Parts A, B, and C
- Section 155(3) prescribes certain minimum requirements for information to be included in three parts of the proposal
- Part A titled "**Background**" must include at least-
  - (i) a complete list of all the material assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;
  - (ii) a complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
  - (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
  - (iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and
  - (v) whether the proposal includes a proposal made informally by a creditor of the company

## The proposal to creditors

- Part B titled "**Proposals**" must include at least-
  - (i) the nature and duration of any proposed debt moratorium;
  - (ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
  - (iii) the treatment of contracts and ongoing role of the company;
  - (iv) the property of the company that is proposed to be available to pay creditors' claims;
  - (v) the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and
  - (vi) the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.



## The proposal to creditors

- In terms of section 155(5) a proposal must conclude with a certificate by an authorised director or prescribed officer of the company stating that any factual information provided appears to be accurate, complete, and up to the date; and projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement



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## The adoption of the proposal

- In terms of section 155(6), a proposal will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by –
  - majority in number, representing at least 75% in value of the creditors or class, as the case may be;
  - present and voting in person or by proxy, at a meeting called for that purpose
- Therefore, there are two requirements –
  - a majority in number of creditors who are present or represented by proxy and who vote on the proposal, irrespective of the value of their claims, must support the proposal; and
  - such majority must own or represent at least 75% of the total value of all creditors' claims
- There is no minimum quorum requirement in terms of the Act
- It is noteworthy that the first requirement serves to protect smaller creditors from larger creditors pushing through a proposal to their detriment



## The adoption of the proposal

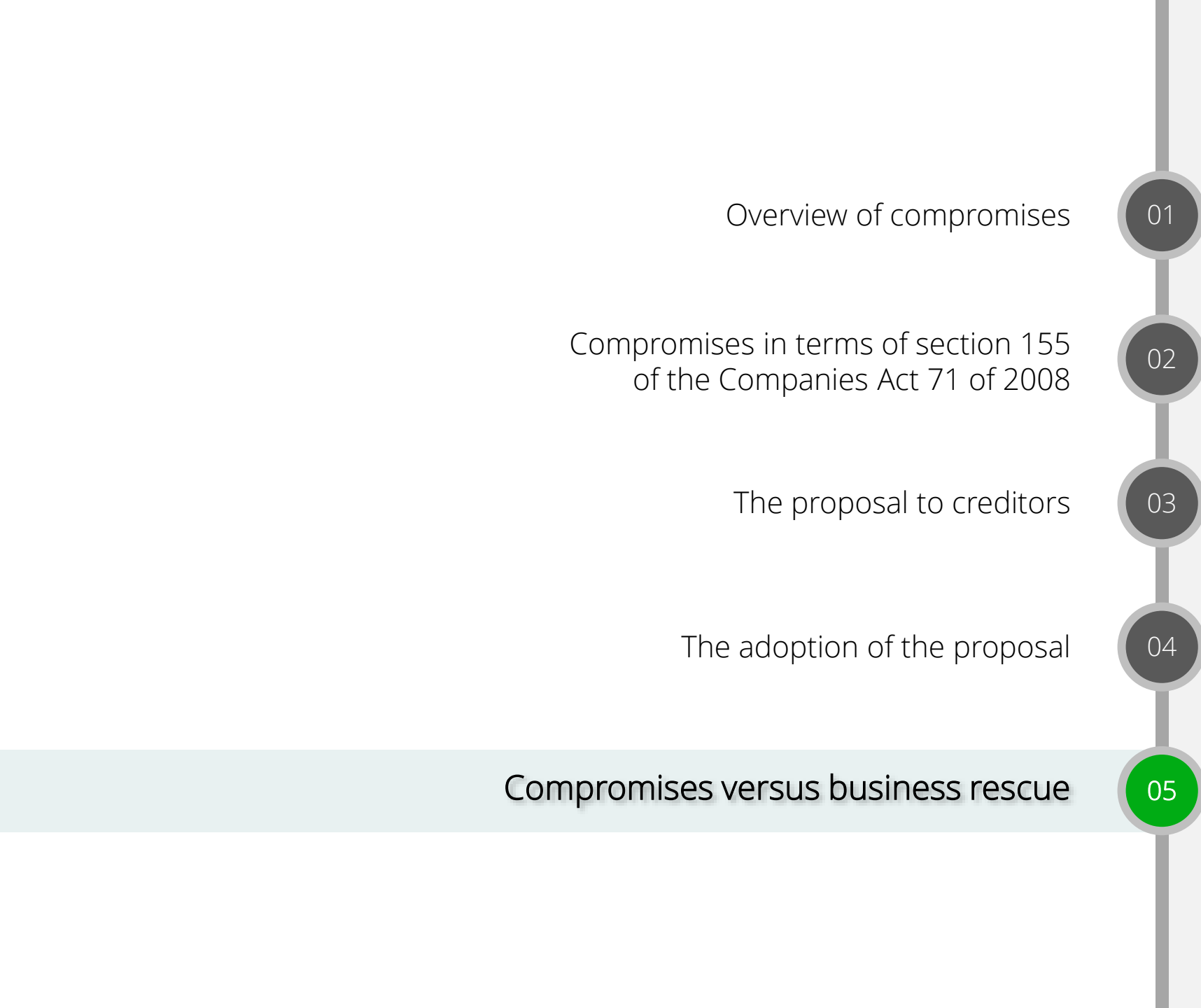
- In terms of section 155(7), where a proposal is adopted as contemplated in subsection (6), the company may apply to the court for an order approving the proposal (not peremptory)
- Although it is no longer obligatory to obtain the approval of the proposal from the court, it seems that the compromise will have to be sanctioned by the court in order to be enforceable against all the parties concerned
- A court, on an application may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to –
  - the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and
  - in the case of a compromise in respect of a company being wound up, the report of the Master of the High Court as required in terms of the Companies Act 61 of 1973



## The adoption of the proposal

- The final step in the section 155 process is set out as follows in section 155(8)
- In terms of section 155(8), a copy of an order of the court sanctioning a compromise must be filed by the company with the Companies and Intellectual Property Commission within five business days;
- In addition, the order of the court must be attached to each copy of the company's Memorandum of Incorporation that is kept at the company's registered office, or elsewhere as contemplated in section 25;
- Lastly, it is important to note that the court order sanctioning the compromise or arrangement is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which it is filed
- Notwithstanding the above, in terms of section 155(9), an arrangement or compromise as contemplated in section 155 does not affect the liability of any person who is a surety of the company





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## Compromises versus Business Rescue

### COMPROMISES

- No requirement to be “financially distressed” to propose a compromise
- No statutory moratorium (although it can be included in the proposal)
- No appointment of the equivalent to a “business rescue practitioner”
- No requirement that the majority in number of creditors who approve the proposal must be independent
- No provision which states that an adopted proposal is binding on all creditors – only once an order sanctioning the compromise is obtained

### BUSINESS RESCUE

- Must be “financially distressed” to apply for business rescue
- Statutory moratorium from the date of the commencement of business rescue
- Business rescue practitioner appointed in resolution or by the court (and the latter sanctioned at a creditors’ meeting)
- Majority who approve a business rescue plan must be independent of the company
- An adopted proposal is binding on all creditors, whether or not they voted



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End of Unit 12

**THANK YOU**

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